No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY, (a corporation),

APPELLANT,

vs.

THE HOSTETTER COMPANY, (a corporation),

APPELLEE.

APPELLEE'S REPLY BRIEF.

E. EDGAR GALBRETH,
ALBERT H. CLARKE,
Solicitors and of Counsel for Appellee.

DEMOSS BOWERS, Law Printer, 175 N. Spring St., Los Angeles.

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APPELLEE'S REPLY BRIEF.

In reply to "Appellant's Supplemental Brief," a copy of which was received by appellee's counsel at Los Angeles, on March 28th, 1902, this brief is filed, by permission of the Court obtained at the time of the argument of this cause.

"The more we consider this case, the more firmly are we convinced that the appellant is *not* entitled to a reversal"

There is but little of *reply* to Appellee's Brief in Appellant's Supplemental Brief, but very much rehashing, revamping and restatement of "Appellant's Brief."

As to Evidence of Fraud.

The evidence of the appellee was *not* meager on any of the issues involved, but was full, fair, convincing and preponderating of fraud on the part of the appellant.

It will be remembered that the evidence by which fraud was shown was adduced by two unimpeached witnesses, Mr. J. W. McEvers and Mr. W. R. Morrison, and was strongly corroborated by many and strong circumstances, which could not be contradicted or denied by appellant, among which may be mentioned the following:

It is undisputed that appellee's witnesses called twice at appellant's place of business and inquired for "Hostetter's Bitters," and made purchases, each time, of ½ gallon of Stomach Bitters, each, of which were put, by the salesman of the appellant, into half gallon demijohns and tagged by him on a regular shipping tag of appellant, as follows: (On the first demijohn the tag read as follows:)

"Samuel Bros. & Company Wholesale Wine & Liquor Dealers, 132-134 First St., San Francisco. ½ gal. H. Bitters." (Tr. p. 112.) On the second

demijohn, (purchased April 6, 1899,) the tag read as follows:

"Samuel Brothers & Company, Wholesale Wine & Liquor Dealers, 132-134 First street, San Francisco. H. Bitters." (Tr. p. 128.)

The bills or invoices covering said purchases were written on the bill heads of appellant and were in the following words:

"San Francisco, Mar. 30, 1899, sold to L. H. Hatch.

½ gal. H. Bitters	2.25	1.12
1 " Tokay		1.50
2 D. Johns		.45
		3.07

Paid, per Samuel Bros. & Co." (Tr. p. 588.)

(Second bill or invoice)

"San Francisco, April 6, 1899.

Sold to Cash:

½ gal. Sherry	.90	.45
½ Tokay	1.50	.75
½ Bitters	2.25	1.15
Dem		.65
		3.00

Paid: Samuel Bros. & Co." (Tr. p. 589.)

There is no denial that the appellant furnished the two empty Hostetter's Bitters bottles at the time of, and in connection with, the sale of the Stomach Bitters in bulk; and this, after appellant's salesman had voluntarily advised, counseled and suggested to ap-

pellee's witnesses that, "You fellows ought to buy Hostetter's Bitters in bulk; that is the cheapest way; we wouldn't handle Hostetter's Bitters if we couldn't also sell them in bulk. The same company that puts up the case goods also sells them in bulk * * * the price is $2.25 a gallon, and that will make nearly eight bottles. * * * You can get a bottle of Hostetter's Bitters and then fill that up whenever it gets empty." (Tr. pp. 110, 180, 590, 591, Defendant's Exhibit No. 1.)

It will be remembered, that the said advice, counsel and suggestions were given by appellant's salesman, to entire strangers, and if appellant would so deal with strangers and transient customers, how much more willingly would they do likewise with regular customers, and with "The Faithful."

As to Appellee's Depositions.

Appellant's counsel makes "Much ado about nothing," with "Fuss and Feathers," regarding the *manner* in which certain of appellee's depositions were taken. (Opening Brief pp. 7 to 12, and Supp. Brief pp. 4 and 5.)

It has been decided over and over again that:

"Objections to the form of the commission, or the *manner* of taking the depositions, or to other irregularities, *must* be made at the time the deposition is taken, if the party is present, or by a motion to suppress *before the trial*, or they will be deemed to be waived, *because* such defects, if presented in time, may be corrected by a re-examination of the witness."

Encyclopedia of Pleading and Practice, at page 629. (Depositions—Objections—When waived. Ed. 1896).

The Supreme Court of the United States, in Howard vs. Stillwell, 139 U. S. 199, 205, declared:

"It is the settled rule of this Court that the failure of a party to note objections to depositions, of the kind in question (to the form of the commission and the manner of taking the deposition,) when they are taken, or to present them by motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition. Shutte vs. Thompson, 15 Wall. 151, 158 et. seq., Mechanics' Bank of Alexandria vs. Seton, 1 Pet. 299, 307; Winas vs. New York and Erie Railroad, 21 How. 88, 100: York Company vs. Central Railroad, 3 Wall. 107, 113: Doane vs. Glenn, 21 Wall. 33, 35: Buddicum vs. Kirk, 3 Cranch, 293, 297: Rich vs. Lambert, 12 How. 347, 354."

"A motion to suppress a deposition or a portion thereof for defects or causes which may be remedied on a re-examination of the witness must be made *before* the trial is begun."

Carlisle vs. Humes, 111 Ala. 672, 20 So. Rep. 462.

"A motion to suppress a deposition for objections appearing on its face must be made, and a decision had *before* the beginning of the trial, and the overruling of such motion made after commencement of the trial is not error."

Truchey vs. Eagleson, 15 Ind. App. 88, 43 N. E. Rep. 146.

The objection to the reading of a deposition at the trial is an objection "that cannot be made at the hearing. It should have been made by a motion to suppress *before* the cause was set for hearing, when, if allowed, the mistake might have been corrected by retaking the deposition. When a cause is set for hearing all technical objections to the reading of the testimony on file are waived."

York Co. vs. Central R. R., 3 Wall. 113.

Blackburne vs. Crawfords, 3 Wall. 191.

Smith vs. The Serapis (D. C.) 49 Fed. 393, at page 398, decides that a motion to suppress depositions, *not made until the hearing*, one month after the depositions have been returned into court and opened, and the case is set for hearing, is made too late; notwithstanding there was not a reasonable notice given of the taking, the depositions having been taking at Beaufort, S. C., on Sept. 22d, under a notice served in Baltimore on Sept. 19th, and did not allow sufficient time for the libellant to be represented at the examination and to cross-examine the witnesses.

In the case of Claxton vs. Adams, 1 MacArthur, 496 (D. C).

"The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress *before* going to trial. The objections in this case, therefore, came too late, even if they

would have been good on a motion to suppress. The issues were closed in the case and in Feb. 1873, the same were ordered on the then calendar (for Jan. term, 1873) by the Court. In March 1873, and while the January term of the court was still in session, the plaintiffs gave notice to the defendant that they would proceed to take the deposition of George Ramsen, and other witnesses, on the 17th, day of March, 1873, before a United States Commissioner in Philadelphia.

No commission to take the deposition was issued by the Court, but the same was taken in pursuance of said notice, and returned in the clerk's office of this Court on the 20th day of March, 1873. The case came on for trial March 11, 1874, and a jury was sworn to try the case.

The plaintiff offered to read in evidence, the deposition so as aforesaid taken, to which the defendant objected. The objection was overruled; to which ruling the defendant excepted.

The deposition being all the evidence, judgment was given for the plaintiffs.

The exception presents the question, whether the Circuit Court erred in overruling the defendant's objections." (Held not to be error).

In the case of Bank of Danville vs. Travers, 4 Bissell 507, being a Motion to suppress depositions for insufficiency of the Notarial certificate, the depositions having been returned and opened in July, 1865; it was said by

Drummond J.—"I think *after* a cause is set down for a hearing, and the deposition has been on file for three years, it is too late to move to exclude it on a technical ground. I think the parties have a right to presume that such a delay is a waiver of any objection of that kind."

The general rule is that all objections or excep-

tions to the formality of depositions must be taken *before* trial.

Corgan vs. Anderson, 30 Illinois, 95.

The depositions in the case at bar, to which objections have been made, were returned into court and opened, and subjected to the inspection of appellant, on May 25, 1900, and the cause was tried in March 1901, nearly one year after the inspection of the deposition by appellant, but no motion was made during all that time, to suppress the depositions, and no motion has ever been made, *at any time*, to suppress the depositions, on the ground for insufficiency of the Notarial certificate, and hence as to that, it should be deemed that appellant has waived the same.

No legal grounds have been shown for the suppression of the depositions, but the grounds upon which the objections have been urged are most imaginative and chimerical, and nothing has been alleged which tends to show that the depositions are either unfair or unjust to appellant.

The depositions, taken on Dec. 18, 1899, at Pittsburgh, Pa., were taken after counsel for appellant had been duly and reasonably notified thereof, (Tr. pp. 93-94) but no attempt was made by counsel to be present or to be represented, and we are forced to the conclusion that counsel for appellant trusted in the hope that some technical objection would be available to interfere with the using of the depositions on the trial, when it would be impossible for

appellee to retake the depositions, for, although the depositions were returned into the Lower Court and opened to the inspection of counsel for appellant on May 25, 1900, (Tr. p. 105), no notice was given nor motion made, by appellant that the depositions were objected to, or that a motion would be made to suppress the same until *after* the cause had been called for trial and such action does not speak well for the honesty or integrity of appellant's counsel to thus seek to deprive appellee of the opportunity to retake the depositions, or to supply the deficiencies, and the writer's colleague, Mr. A. H. Clarke, was warranted in saying that he was "surprised" at the motion to suppress the depositions *after* the trial of the case had been commenced.

But the courts have long since provided against such crafty practice, and have many times and uniformly held that a motion to suppress depositions for formal defects, must be made *before* the trial is begun.

In the case of the American Exch. Nat. Bank vs. First Nat. Bank, 27 C. C. A. 274-277; 82 Fed. 961, the Court, in referring to the matter of a notice to take deposition being short, where no effort appeared to have been made to secure a postponement of the examination; and refused to suppress the deposition, said:

"In times past the statutes providing for the taking of testimony by deposition were construed with great strictness, and any deviation from the provisions thereof was held fatal to the deposition, but

since the amendment of the statute requiring notice to be given, and, under the more enlightened views obtained at the present time in regard to the effect of purely formal defects in matter of procedure and practice some merely informal deviations from the statutory provisions regulating the taking of testimony are not held fatal thereto."

Kansas City, F. S. & M. R. Co. vs. Stoner, 2 C. C. A., 437-444; 51 Fed. 649.

"Objections to the reading of depositions, taken with notice, should be substantial (showing prejudice or injury), and not technical, before it should be sustained."

As to Right to Use a Name.

Lever Bros. Limited Boston Works, v. Smith; 112 Fed. Rep. 998, 1000.

In this case it was said: "An order may be entered for an injunction restraining the defendant from using the word "Welcome," segregated from the surname or in larger type or letters than the surname, or so located as to admit of the inference that the soap is Welcome Soap, manufactured by A. Smith, would be restrained."

Sterling Remedy Co., vs. Spervine Medical Co., 112 Fed. Rep. 1000 (N. Dist. 111.)

Neither one's name, nor a geographical name, nor a name descriptive of a quality can be used for the purpose of perpetrating a fraud which affects the public.

Meyer Medicine Co., 7 C. C. A. 558; 58 Fed. Rep. 884.

Pillsbury vs. Mills Co., 12 C. C. A. 432; 64 Fed. Rep. 841.

Mills Co., vs. Eagle, (C. C.) 82 Fed. Rep. 816.

Williams vs. Mitchell, 45 C. C. A. 265, 106 Fed. Rep. 168.

Reddgway vs. Banham (1896) App. case 199.

La Republique Francaise vs. Saratoga Vichy Spring Co., 107 Fed. 459, 46 C. C. A. 418.

(Note to Elgin Nat'l. Watch Co., vs. Illinois Watch Co., 45 U. S. 1. Ed. at page 379.)

"Manufacturers of bitters from a *secret* recipe, which have become widely known as 'Angostura Bitters,' from the name of the town where first manufactured, * * * are entitled to enjoin the use of the word 'Angostura' upon a different bitters * * * where such use was calculated to deceive the public."

Siegert vs. Findlater, 7 Ch. Div. 801, 47 L. J. Ch. N. S. 233, 38 L. T. N. S. 349, 26 Week. Rep. 459.

In the case of Van Hoboken et al. vs. Mohns & Kaltenbach, 112 Fed. 528, 530, the Court says:

"A fundamental principle in the law of trademarks is the protection of the owner of the trademark against fraud in its use by others. This fraud may consist in such a use of a *trade name*, or mark, as to induce purchasers to believe that they are obtaining the article which has won reputation under the particular *name* or mark."

In the case of N. K. Fairbank Co., vs. Luckel, King & Cake Soap Co., 42 C. C. A. 376, 379, 102 Fed. 327, 331, Judge Hawley, speaking for the Court of Appeals for the Ninth Circuit, said:

"It must constantly be borne in mind that there are two kinds of trade-marks—one of peculiar pictures, labels, or symbols; the other in the use of a *name.*"

Even a man may not use his *own* name, in connection with his business transaction, in such a tricky manner as to injure another's business; (how much less will a Court of Equity allow the use of another's name to the detriment of that other person).

In the case of International Silver Co., vs. Wm. G. Rogers Co., 113 Fed. 526, 527; the Court quotes and adopts the following language:

"A tricky, dishonest, and fraudulent use of a man's *own* name for the purpose of deceiving the public and of decoying it to a purchase of goods under a mistake or misapprehension of facts, will be prevented."

As to Requiring Two Witnesses.

In the case of the United States of America vs. Parrott, et al., 1 McAllister, 447, 451, the Court says:

"Can it be contended with any reason, that when the parties come into a Court of Equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made 'Upon information and belief,' the character which the law annexes to an answer where the denial of the fraud is on personal knowledge?"

"The allegations of a bill, are mere pleadings; the averments in an answer responsive to them, are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative

circumstances. To consider that the denials of an answer on 'information and belief' are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge, simply is to confound the distinction which exists between pleading and evidence."

(And we might add: How much more so, as in the case at bar, where *no* "Knowledge or belief," even, is alleged to exist.)

Replying more fully to the cases cited in Appellant's Brief pp. 24-25, as to appellee having no exclusive right to make Hostetter's Bitters, or to call them by that name, (counsel complaining because of our brevity, Supp. Brief, p. 21):

Hostetter vs. Adams—10 Fed. 838; does not decide that the plaintiffs have no exclusive right to call the stomach bitters they make "*Hostetter's* Stomach Bitters;" but only that their trade mark is not in the words "Celebrated Stomach Bitters," and we might add, that any one who can, has the right to make "Celebrated Stomach Bitters," but must leave off the word "Hostetter's."

Hostetter vs. Fries—17 Fed. 620, is a decision rendered on application for a *preliminary* injunction to to restrain defendants from selling certain essences, oils and extracts, which could be so manipulated and used as to *produce* an imitation of Hostetter's Bitters, and not from selling the imitation bitters, the Court saying that, "Complainant's property consists in the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels,

bottles, and other devices, which designate the preparation as of their own manufacture, and indicate its origin."

But by the evolution of the doctrine of unfair trade, as administered by the courts of equity at this time, this case is no longer good law, and, as is said by the author of "Hopkins Unfair Trade," (an authority quoted by appellant) on page 190, in note 2, to section 87, referring to this (Fries) case "This decision is entitled to no weight," And adds, (in note 1 on page 191, after referring to Hostetter vs. Bruggerman—Reinart Co., 46 Fed. 188, and to Hostetter vs. Sommers, 84 Fed. 233,) "These cases overrule Hostetter vs. Fries, 17 Fed. Rep. 620."

The dictum found in this (Fries) case, (founded on the erroneous assumption that Dr. Hostetter had made known and published his formula or recipe for the compounding of the Hostetter's Bitters) that "The complainants have not the exclusive right to make Bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell Bitters by the name of Hostetter's Bitters" has been overruled in the more recent (1901) and better considered case of Hostetter Co., vs. Conron, 111 Fed. Rep. 737, in which the Court says:

"This is an action to restrain unfair trade. The defendant is charged with having sold a cheap imitation article as genuine Hostetter's Bitters. These

Bitters are prepared only by the complainant. They are made by secret formula. The law applicable to this situation is well settled and need not again be stated. Hostetter Co., vs. Brueggerman-Reinart Co., (C. C.,) 46 Fed. 148; same vs. Sommers (C. C.) 84 Fed. 333; same vs. Bower, (C. C.) 74 Fed. 235; same vs. Comerford (C. C. 97 Fed. 585.)" (The decree as prayed for was granted.)

Singer Mfg. Co., vs. Riley, 11 Fed. 706, was for a *preliminary* injunction, and the patent on the machine had expired and Congress had refused to renew it.

In the case of Singer Mfg. Co., vs. Larson, Fed. Cas. 12, 905, the patents had all expired. Also, in the case of Centaur Co., vs. Heinsfurther, 84 Fed. 955, the patent had expired, and thereupon became public property. And the case of Centaur Co., vs. Marshall, 97 Fed. 785, was for a *preliminary* injuction. In Watkins vs. Landon, 54 N. W., Rep. (Minn.) 193, the facts appear to be, that in 1856, and prior thereto, one Ward, made and sold, under the name of "Ward's Botanical Liniment," a medicinal compound, prepared in accordance with a formula or recipe owned by him. In that case it appears he had sold and *imparted* to one Sands the *formula* for making the liniment.

It is very evident, without argument, that this last mentioned case is not authority for the position taken by the appellant, but on the contrary, is very good authority for the position occupied by the appellee, as

appellee never "Sold and imparted to any one the formula for making Hostetter's Bitters."

The trade-name, "Hostetter's," used in the preparation and sale of Stomach Bitters, has been so used for more than forty years by the appellee and its predecessors in title, in a very extensive trade, with unbroken acquiescence, save the occasional instances as shown by litigation in the courts.

It does not indicate merely that the appellee is the manufacturer and producer of the Stomach Bitters sold under that name, but quite as much that it is compounded and put on the market under appellee's implied representation of uniform quality and excellence. "Courts of equity have the power to protect trade-names, such as this, otherwise a manufacturer, producer or dealer, who furnishes goods of such excellent quality that they build up so extensive trade as to gain a distinctive name to their merchandise, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct."

Atwater vs. Castner, 32 C. C. A. 77-79.

No one had ever used the word "Hostetter's" in connection with the making or selling of Stomach Bitters, before appellee and its predecessors, and neither the appellee nor its predecessors, have ever acquiesced in the use of the word "Hostetter's," in connection with the manufacture or sale of Stomach Bitters, as shown by the prosecution of several suits to a finality for an infringement of their rights

therein, clearly showing a lack of acquiescence; and the fact, as shown by the evidence, herein, that the word "Hostetter's," had been several times registered in the patent office as a trade-mark or a trade-name, (Tr. p. 70, 380-Int. p. 395 Ans. to Int. 3,) is entitled to weight in determining the question that the trade name indicates, and is understood to refer to, the maker or producer of "Hostetter's Stomach Bitters," and that it is *not* "merely descriptive of the character and quality of the goods to which it is applied."

Hygeia Distilled Water Co., vs. Hygeia Ice Co., 40 Atl. Rep. 538.

The assumption and use of the name "Hostetter's," in connection with the sale of Stomach Bitters, by the appellant, was so assumed and used "with a view to deceive the public, and to induce the belief that the product marketed and sold was prepared under his (Hostetter's) supervision, and offered to the public with his sanction. Under such circumstances, equity will not hesitate to extend its preventive arm."

Kathreiner's Malzkaffee Fab. vs. Pastor Kneipp Med. Co., 27 C. C. A., 351-355; 82 Fed. Rep. 321. (See, also, note at end of case.)

"The name (Hostetter's) indicated the origin, and was a guarantee of the superior excellence of the goods, and was so recognized."

The Peck Brothers & Company vs. Peck Bros. Co., 113 Fed. 291-296.

"In Appellant's Supplemental Brief," (p. 2) counsel says, "If there had been any attempt on the part of the appellant to run appellee's goods out of the market, the appellant's own goods would invariably have been set forth; but in not one instance was this the case." Why does he say *invariably?* We do not think appellant would invariably set forth his own goods *to a stranger*, even when it desired "to run appellee's goods out of the market," by substituting therefor other bitters, as is clearly shown, in this instance, by the testimony of Paul Samuel (Tr. fol. 232), where, to the leading and suggestive question of appellant's counsel, "Did you suggest to them that these H. Bitters were Hostetter's Bitters or genuine Hostetter's Bitters sold by the complainant or made by them?" made answer, "No, sir; I told them that the bitters were better than Hostetter's Bitters. They were bitters better than Hostetter's Bitters, and *naturally tried to sell my own bitters.*"

We do not doubt that it was quite *natural*, judging from the conduct of appellant, for them to try to sell their own bitters, even to the extent of representing them to be genuine Hostetter's Bitters. Samuel never said, "They were a bitters better than Hostetter's Bitters," as is shown by his testimony just previously given (Tr. fol. 231, 232), and this latter statement was an after thought given in response to

said suggestive and leading question, and which was objected to on that ground. (Tr. fol. 232).

Out of the mouth of appellant's principal witness, Paul Samuel, is appellant convicted of possessing the spirit and using the means of "unfair competition," and is shown not to be "honest in its business transactions," and does not "rely upon the merits of its own goods," but "undertakes to palm off inferior goods as for goods of the genuine manufacturer," whereby, with a single article of its merchandise, appellant is able not only to injure "Hostetter," by the use of the *initial* letter "H," but many other persons, whose initial letter of name is the letter "H," and of course, thereby deceives and commits a fraud upon the public; and not only so, but the fertility of counsel in exactly describing, and the ingenuity of the witness in cheerfully approving, the scheme, in that respect, seem to be relished by them.

The testimony is as follows:

"Q. 22. There are a great many different kinds of bitters?

A. Yes, sir; a great many.

Q. 23. Are there any different kinds of bitters commencing with the letter "H" as an *initial* of the *name* of the bitters?

A. I know of a great many, yes, sir.

Q. 24. Tell me a few?

A. There is Huffland; Dr. Hanley's; Highland Bitters; Herb Bitters; Hoff Bitters; Hamburg Bitters. Those are all bitters on the market. (Tr. p. 235).

The statement, (Supp. Br. 3), that appellee's witnesses "lied to appellant, giving the name Hatch instead of their own names, (Tr. pp. 182, 588), and saying they had broken the bottle, which they had not," (Tr. pp. 199, 200), is, to say the least, a misstatement made by counsel and which he knew to be untrue in fact, if so be he knew what was in the record, for neither of the witnesses said his name was Hatch, nor did they say they had broken the bottle which they had not. In answer to Paul Samuel's question, "Who shall I make this bill out to?", Mr. McEvers replied, "L. H. Hatch." (Tr. p. 182). Nothing else was said relating to that matter. As to the broken bottle. Mr. McEvers said to Mr. Samuel "We broke our Hostetter bottle a few days ago," and he (Samuel) then said to the man who was going up the stairs with demijohns for the goods, "Bring down an empty Hostetter's bottle with you." The man soon returned with the demijohns of wines and Hostetter's Bitters and an empty bottle." (Tr. p. 191, 126, 127). Nothing more was said relating to that matter.

Nothing was said about the broken bottle being the one obtained from appellee, the fact was that as soon as the statement was made that a Hostetter bottle had been broken, and before any explanation could have been given, Mr. Samuel directed a man to "Bring down an empty Hostetter bottle with you."

Mr. R. H. Countryman, counsel for appellant, was associate counsel in the case of The Hostetter Com-

pany vs. E. Martinoni, case No. 12,780, In Equity, in the Court below, and being one of the cases referred to herein, (Tr. pp. 251, 271), and we presume that he is familiar with the testimony given in that case, and if so he knows that the evidence in the Martinoni case shows that a Hostetter bottle was broken, the fragments of which were offered and admitted in evidence in said case, as complainant's Exhibit No. 7 and was exhibited to the Court upon the trial of that cause, and now remains as such exhibit therein, and we think that we are justified in now saying, that counsel has not shown good faith, and an honest purpose, in charging that appellee's witnesses lied in their testimony relating to the name "L. H. Hatch" or to the broken bottle, and especially is this belief strengthened when it is remembered that counsel in asking the witness, McEvers, about the broken bottle, (Tr. pp. 199, 200), limited it to a bottle obtained from appellant, by asking this question: "Q. 3. Did you break the bottle or any Hostetter bottle *which you obtained from Samuel Bros. & Company.*" (Tr. p. 200).

And so might we very properly stigmatize many of the erroneous statements of counsel, injected into appellant's briefs, presumably for the purpose of thus insidiously misleading the Court, with the hope that the appellee's cause will be thereby prejudiced, and the appellant's benefited; a few of which statements we specify:

(a) Referring to witness (Morrison), "Probably

his hard swearing on the eastern circuit had made him ill," (Supp. Br. 3), when he had never been in the employ of appellant there, or a witness for it there.

(b) The statement, "There is no such evidence," (Supp. Br. 2.) that, "Upon application for Hostetter's Bitters" (Tr. 8), "instead of giving him Hostetters, Bitters, appellant gave other Bitters, representing it to be appellee's Bitters, and suggesting that the purchaser sell it as and for appellee's Bitters," (Supp. Br. 2), must be known, by counsel, to be false, for the reason that much evidence was adduced in the very presence and hearing of counsel, to that very effect. (Tr. pp. 110, 180, bottom 181, top 182, 590, 591, 592—"Defendant's Exhibit No. 1.")

(c) The statement: "The genuine goods were always produced." (Supp. Br. p. 2,) The genuine goods were *not* always produced, (and never produced except to strangers,) for there is no pretense in this case that they were produced at the *second* visit of appellee's witnesses. Also, said witnesses never "suggested Bulk Bitters," but on the contrary the same was suggested by appellant's salesman. (See Tr. pp. 110, 180, bottom 181, top 182, also 590, 591, 592—"Defendant's Exhibit No. 1").

No "act of appellant which the appellee has cited as fraudulent took place at the direct instance or request of the appellee's agents," (Supp. Br. 3). (See Tr. p. 110, and as last above cited), and so "the irresistible force of this position will appeal to the Court," but not in the manner hoped for, and suggested in Appellant's Supplemental Brief, page 4.

The wild and unreasonable hope of counsel that this Honorable Court can be induced to look through counsel's distorted medium of vision (Appellant's Briefs) and see what "would seem enough to prejudice appellee's case," (Supp. Br. 4), is not well founded.

Even at the time of the trial (after the trial had been commenced), appellant's objections to the reading of the depositions, were five, only, and were as follows:

First. "Because timely notice of the taking of said depositions had not been given, and

Second. Because insufficient time had been allowed for Respondent's counsel and solicitors to reach the place of the taking of said deposition, and

Third. Because the taking of said depositions was had before the time for which the same was noticed, and

Fourth. Because the taking of the same was adjourned for more than one day, and adjourned from day to day, and

Fifth. Because it appears that the taking of said depositions filed in the causes of The Hostetter Company vs Martinoni, No. 12,780, and the same complainant against Modry—12,779, Ahrens—12,786, Levy—12,787, Carroll—12,790, Venaglia—12,793, Marish—12,794, with which cause this cause was argued and tried, and heard before the Court, were carbon copies, and that the witnesses therein had not testified in the several different causes and that

it was not shown in which of said causes, if any, said witnesses had so testified, and that the same typographical mistakes appear in each of said depositions and in the depositions taken under subsequent commissions in said causes, and that the taking of said depositions were noticed at the same day and hour of the day." (Tr. p. 566).

The manner of taking the depositions was set forth in the notice to take said depositions, which recited that appellee would "proceed to take testimony in shorthand, to be afterwards reduced to writing upon a typewriting machine, on behalf of Complainant, for final hearing in the above-entitled cause." (Tr. p. 94).

No exceptions or objections were *ever* made to the *manner* of taking the depositions, i. e., first in shorthand to be afterwards reduced to writing upon a typewriting machine (and which was done). We have examined the depositions of the testimony in the case at bar and find that the same is an original, and not a carbon copy, and we fail to see the force of the argument that because, forsooth, the commissioner (the Notary Public) in transcribing the depositions, (all being to the identical questions and subject matter, would of necessity, if truthful, be identical in form and substance), may have used some carbon copies, in some of the cases, instead of the original copy, gives no ground for complaint, for they were all duly signed and executed by the re-

spective witnesses, and shows neither prejudice nor injury to appellant.

In appellant's answer filed in this case, "defendant admits that no other person or persons, firm, or corporation has the right to deal in or sell any article of Stomach Bitters under any of said names, ("Hostetter Celebrated Stomach Bitters," or "Hostetter," or "Host," or "H. Bitters,") not made or compounded, (by appellee), either in bulk, or by the gallon, or in the bottles once used by complainant, or those resembling complainant's, to an extent calculated to mislead or deceive." Also, "This defendant admits that he has been informed and does believe that the Stomach Bitters prepared by complainant have been and are put up and sold as alleged in the third paragraph of said Bill of Complaint, to-wit, in an amber-colored bottle, holding nearly a quart; with the words "Dr. J. Hostetter's Stomach Bitters" blown in the bottle; Said bottles having thereon certain labels, copies of which are attached to said bill of complaint and marked "A" and "B"; Also, "This defendant admits the popularity of the Stomach Bitters made and sold by complainant;" Also, "Defendant admits that it had sold, and is now selling and intends to continue to sell, at its place of business an article of Stomach Bitters slightly resembling the Stomach Bitters made by Complainant in color, taste and smell." (Tr. pp. bottom 18, 19, 20, 22).

After appellant made the above-mentioned admis-

sions, in the pleadings in the case, why does it now, through its counsel, strive to entrap the Court, by seeking to befog the real issues in the case, in many ways, a few of which we notice:

By endeavoring to divert the Court's attention to matters to which no exceptions or objections were taken in the Court below, and concerning which this Honorable Court are not interested, and of which no notice can be taken, such as:

(a) "It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true." (Appellant's Opening Brief, p. 8).

These statements were made in the face of the record that the testimony of the witnesses was taken in shorthand and afterward reduced to typewriting, and was signed by the witnesses, and so certified to by the notary public, with no pretence of showing to the contrary. We can think of no imaginable excuse for such trifling with a Court of Justice.

The effrontery and temerity of counsel in introducing to a Federal Court of Equity such palpably fraudulent statements, and expecting to use them as evidence, is as serious a breach of professional etiquette and candor, nay, of the duties of an attorney, as it is a failure of evidence.

(c) "The authorities that the omission of the officer taking the deposition to certify that he reduced the testimony to writing himself, or that it was done

by the witness himself, in his presence, is fatal to the deposition, and that such facts will not be presumed, but must clearly appear from the certificate, and that the officer must certify that he reduced the deposition to writing in the presence of a witness." (Opening Brief, p. 41).

No objection or exception was *ever* taken or offered to any certificate of the officer taking any of the depositions, and we think the court would be fully justified in believing that such statements by counsel, as above must be made solely for the purpose of befogging the issues of the case.

(d) "It may be noted that the certificates do not show, nor was there any proof offered to the effect that the witnesses named in said depositions were not within one hundred miles of San Francisco at the time of the trial of the cause." (Opening Brief, p. 42.)

Doubtless this statement was made for like purposes as the one above, for counsel knew "that the witnesses named in said depositions" resided in Pittsburgh, Pa., as shown by the depositions and that the Court would take judicial knowledge of the fact that Pittsburgh is "not within one hundred miles of San Francisco." (Mutual Ben. Life Ins. Co. v. Robinson, 58 Fed. 723.)

(e) By introducing matters *dehors* the record.

"That one of the two (witnesses) was temporarily in the employ of Reddington & Co., the local distributor of appellee, until just after the trial, so as to give him

a prestige of being connected with the direct trade, and also to keep his testimony in line, while immediately after the trial he was discharged."

The above statement is entirely gratuitous, unfounded and wholly false, but entirely in keeping with many other statements of counsel for appellant. And as to that part of the statement, "While immediately after the trial he was discharged," the writer believes to be false and untrue, for he never heard of him (McEvers) having been discharged, but that he left the employment of Reddington & Co., for the betterment of his condition, and is even now employed by E. J. Wittenberg Co., Wholesale Druggists, in San Francisco. Neither of these witnesses, (McEvers & Morrison) were impeached by counsel during the taking of the testimony in the case, when they could have defended themselves and being the only *legal* way and time in which they could be impeached, but it was left for the questionable manipulations of counsel in his briefs to attack and attempt to slur their characters. They were unimpeached, and in fact, were and are unimpeachable.

(f) Referring to appellee's witnesses, "In one case, appellee's two spies, during the hearing before the examiner, were confronted with samples, and could not tell that of the appellee from that of the defendant, although they pretended to be experts." (Supp. Br. 39.)

That there is nothing in the record to even suggest

such a statement, much less to support it, makes no difference to counsel so long as there is hope that the Court may be influenced thereby, and notwithstanding the more serious fact that the statement is false.

Appellant's counsel, referring to appellee's medicinal preparation, says (Supp. Br. p. 42):

(g) "No sane man would expect to find medicine as strong in alcohol as a drink of whiskey, or a whiskey cocktail."

Counsel must have known that the above statement was intended to mislead and prejudice the Court against appellee, by insidiously insinuating that the genuine "Hostetter's Bitters" contains as much alcohol as whiskey, when he knew by the evidence produced by appellant—the alcohol does not exceed 34 per cent. by volume, while the testimony of the very competent chemist, (Prof. Thomas Price) appointed by the lower Court, shows that the percentage of alcohol in whiskey, "goes all the way from 60 per cent. up to 80 per cent." (Tr. p. 540.)

(h) "Is this appellee with its record of wrecked homes, shattered lives, deaths and skeletons, deserving of any equitable consideration?" (Supp. Br. p. 50.)

The above false, reckless and slanderous statement is made, not only in the absence of the record of all evidence showing, or even tending to show such a condition or state of things attributable to appellee, but on the contrary where the most strenuous efforts and careful searching, by appellant for such evidence

completely failed to reveal a single instance where any man, woman or child had been injuriously affected by appellee's medicinal preparation, whereas, on the contrary, much clear, concise and convincing testimony of many witnesses on behalf of appellee, proves that much good, and no harm, is done by the use of said preparation.

Counsel in his statements, recks but little, whether within or without the record, if by any means the Court may be led to confusion and appellant be profited thereby, and the cause of the appellee be prejudiced in the mind of the Court.

By unjustly and without excuse, heaping unmerited abuse upon Mr. Clarke (of counsel for appellee,) and charging him with fraud, slurring the lower court, cajoling and threatening this Honorable Court:

(i) "Mr. Clarke knew then, before preparing the interrogatories, the discrepancy between the Wuth and Curtis analyses, and the reason therefor, yet he willfully omitted to make this known to Dr. Golding, sought evidence from him to show that the amount of alcohol had been 'pushed up' when he knew it had not been, concealed from Dr. D' Homergue and Mr. Wuth that the alcohol in the Curtis analysis was 'by volume,'" and the long, venomous and uncalled for tirade against Mr. Clark following. (Supp. Br. pp. 44, 45, 46.)

Mr. Clarke is a gentleman, now seventy-six years of age, admitted to and has practiced in many of the Federal Courts of the United States, including the Supreme Court of the United States, and against whom not one breath of suspicion or unprofessional

conduct ever was charged, or can be justly charged or brought against him; and in this instance, there is no reason or foundation for this unprofessional act and unjust attack, being made on Mr. Clarke by appellant's counsel, but which was probably inspired by Mr. Gardiner, in whom appellant's counsel says he takes "Great pleasure in acknowledging the most valuable assistance." (Supp. Br. p. 52.)

(j) In the opinion rendered by the lower court in this case, the distinguished Judge, speaking of complainant's preparation, uses the following language: "The fact of its being alcohol to a certain extent cannot be unknown to the public, as the very word 'Bitters' can only be defined as 'a liquor, generally spirituous, in which bitter herbs or roots are steeped."

To this language, used by the lower Court, counsel for appellant thus slurringly replies: "There was some contention that the public ought to know that the Bitters were alcoholic, because the word 'Bitters' was notice of that fact." (Supp. Br. p. 42.) And further to the same effect, "we think the distinguished Circuit Judge overlooked the testimony of defendant's witnesses, and the very flimsy character of the testimony produced by appellee as to any wrong-doing by appellant from the fact that a number of similar cases were argued and submitted at the same time." (Opening Br. p. 13.) And still further, to the same effect, "Only a few days ago, in the case of Martini vs. Sarocca, Circuit Court No.

12,893, Judge Morrow, of this circuit, dismissed the case on account of complainant's failure affirmatively to show title to a label to which they undoubtedly had a title, and it is only, to our minds, because Judge Morrow overlooked this point in deciding this case, that our case failed to go off on the same ground." (Supp. Brief p. 10).

Counsel would have this Court to believe that Judge Morrow was either negligent or incompetent, or both.

As to cajoling this Court:

(k) "We have not thought it necessary for us to demonstrate to the court that the laws of Pennsylvania require a confirmation of sale of personal property." (Supp. Br. p. 7).

While we very properly credited this Court with the knowledge of the fact that the laws of Pennsylvania do not require the confirmation of sale of personal property, but of real estate only, (Purd. Dig. —Decedent's Estates, Sec. 110, Et seq. p. 427,) we cannot resist the conclusion that counsel had hope that something might be gained by persistency in that line.

(l) And further, to the same effect, "we recognize the fact that defendant in such an action as this comes into court under a cloud, and that the tendency has been almost to presume him guilty," *et seq.* (Supp. Br. p. 12).

(m) And still further to the same effect, "We envy this Court its opportunity. It is not often that so large an opportunity to do good and to check evil

is presented. A decision for appellant will work a world of good throughout this land, and will stand as a precedent which will make quacks hesitate before they 'put their money into a bag with holes.' " (Supp. Br. p. 51).

We feel there could be no stronger statement of the fact that "A decision for appellant" will totally ruin appellee's business, which by long years of honest dealings and business fidelity has won for it an enviable position in the business world, and would open wide the door for a fraud upon the public, by the sale of what is admitted to be, by appellant, "An alcoholic stimulant," such as was bought from appellant, (Opening Br. p. 75) instead of the medicinal preparation, proven to be beneficial, manufactured by appellee. (See testimony cited—Appellee's Br. p. 5).

As to threatening this Court:

(n) That this Court might be placed *in terrorem*, appellant says:

"We call the Court's attention to a conflict between the opinion of the Circuit Court in the case at bar, and the opinions of other circuits as shown by the cases reported in 10 Fed. 338; 17 Fed. 621; 62 Fed. 600; 74 Fed. 235 and 97 Fed. 585, and assume that, if requested, this Court will certify the question herein to the Supreme Court." (Opening Brief pp. 74 and 75.)

"What does this mean?" What this means, and only can mean, is, that this Honorable Court is warned and threatened beforehand, by counsel for appellant, that, if it dared to affirm the acts of

the lower Court, an appeal will be taken "to the Supreme Court," thus seeking, but vainly, to intimidate the Federal Court, which courts are the bulwarks of our American institutions, worthy of all confidence, admiration and respect; but it seems that the appellant's thirst and love for the commercialism of the age, aided by the heated and intemperate language of its counsel, spares not even our best and dearest, but invades with menaces the sacred precincts of our most cherished institutions and destroys the ideals of our profession, and drags the practice of law down to the meanest and most detestable purposes.

The Federal Courts hold a power which is mighty for good in the dealing with iniquity. They may work wonders in suppressing fraud, and fraudulent practices in trade, and may even make men honest, at least outwardly, as was done by an injunction by the lower Court in the case at bar, after finding that the facts presented "a clear case of unfair competition in trade, and the doctrine rests squarely on the proposition that men must be honest in their business transactions and rely upon the merits of their own goods, and not to undertake to palm off inferior goods as and for goods of the genuine manufacturer." (Tr. p. 559).

"We have confidence that the Federal Courts are alive to this, and that they will assert themselves to the great gratitude of a long-suffering public," and

will sustain the just and equitable findings and actions of the lower Court, and dismiss this appeal with costs.

Respectfully submitted,

E. Edgar Galbreth,
Solicitor and Counsel for Appellee.

ADDENDA; By Mr. Clarke.

PITTSBURGH, April 5, 1902.

Through the courtesy of the clerk, Mr. Monckton I have received "Appellant's Supplemental Brief."

At the final hearing of this case September, 16, 1901, I had with me a couple of printed briefs and offered to exchange with defendant's solicitor, which offer was not accepted. I left a copy with the Court and gave one to the Clerk; afterwards sending copies from here.

Some weeks afterwards I received a type-written copy of a most abusive paper called a "Brief," and signed by the same William M. Gardiner, whose name appears at the tail end of the present "Appellant's Supplemental Brief," and the vile, false and ungentlemanly language is substantially the same in both.

Why this Mr. Gardiner should have conceived so much hatred for me, personally, is difficult to understand. He had unlimited time in which to speak, and in reply, my time was quite limited. I only now recall the fact that I complimented him upon having delivered a masterly temperance address, which, at the time, struck me as quite after the language of the noted Temperance Lecturer, Murphy, yet I refrained from accusing him of indulging in plagiarism. His expressions "record of wrecked homes, shattered lives, deaths and skeletons," are quite like Murphy.

This same Mr. Gardiner appeared at the hearing of this case, although he is not the solicitor of record, and if we too, may "read between the lines," was the instigator of this delay in the case, through the application for privilege to file another brief. Mr. Countryman fathers the last brief, yet it does not sound like the first, nor does it remind one of his oral argument. I was at the time of argument, more impressed with the personal appearance of the gentleman; his handsome face, energetic and forceful delivery, and his small feet, than aught else, and was sorry the Court would not enlarge his time for an exhibition of his prowess in the photographic art. It was to have been a "side show," I suppose, since there is nothing relating to his exploits hinted at, in the most remote degree in the record. Yet this attempted introduction of his own testimony in the case, is quite in keeping with much that appears in the briefs. The statements are mostly *dehors* the record.

There was really no valid reason for asking the Court to grant the privilege to file another brief, and Mr. Countryman (who fathers the other man's abusive epithets,) knew so at the time. There is nothing new in said brief, save the tirade against Mr. Clarke; bluffs, braggadocio and false statements regarding the testimony.

But, let us look at this Supplemental Brief for a moment.

On the first and second pages it is claimed we were

obliged to show fraud, and this we have done by the testimony of two unimpeached, and unimpeachable witnesses (besides the Exhibits) who though called "spies" so frequently are honest, hardworking gentlemen and the Court below having so found, is this Court inclined to disturb such finding, unless gross mistakes were made? *Scienter* is not necessarily to be shown, but fraud is presumed from the facts, the transactions of the defendant. These transactions are shown on pages 109 and 110, and 179 to 182, of the printed record. The statement in the second section, page 2, of said brief, is certainly in error, as these men were engaged simply to ascertain, etc., (pp. 212, 213 & 140, 141.) Counsel would have been very unwise to have taken the course indicated by my handsome friend. In the next section much is said about the gravamen of our case. Well we have thought that the gravamen of any case was the real cause of complaint, not in the exact language adopted, or made use of in presenting it, yet this modern "Daniel" would have it otherwise. In this section he makes use of the word "spies" applying it to the witnesses in California, no less than *five* times, while he only refers or mentions "Our Opening Brief," once, which is quite modest, to be sure, because, according to the latest brief, "Our Opening Brief," was a scorcher, and the Court is admonished no less than *seven times*, to give attention particularly to "Our Opening Brief," for therein are laid down the law and the fact.

The grain of truth in this section, is that defendant kept the genuine goods, made by complainant. They always do that. Samuel says, (p. 232): I "naturally tried to sell my own bitters." This in answer to a question by his solicitor. (Vide, Enoch Morgan, vs. Vendover, 43 Fed. R. 420.) The passer of counterfeit money always has the genuine on hand.

The next section, page 6, is evidently intended to convey an erroneous impression upon this Court. The "surprise" was that I had no notice whatever of the motion of the distinguished gentleman, to strike down our proofs. This was in the Martinoni case and the record being produced, was examined by the Court, and I also looked at the depositions, the certificate of the Examiner, and signature of the witnesses, and the Court promptly overruled his motion. My surprise was simply that I had received *no notice* as provided for by Equity Rules, 3 & 4.

Had we received such notice, we could have asked to amend in any particular where it might be required. But, we have cited authorities in "Our Opening Brief." (If this is to be the manner of designation.) This is not a very nice trick in my handsome young friend, and if he follows this semetic practice, he will be sure to learn the truth of the saying regarding the roosting of chickens. He well knows he refused to acknowledge the receipt of all notices, and thus requiring us to go to the expense of proving service. He well knows also, that he never, by word,

deed or act, gave the first intimation that he would appear at Pittsburgh and cross-examine, and that he successfully contested our intention to take the proofs in New York, under notice, so as to be able to question the witnesses to a greater extent than where the depositions are taken by interrogatories, as was done. He knew we would be handicapped by that smart trick. The errors, if any, of the Examiner, are of but little moment. The witnesses read their depositions, signed them and that the questions and answers are unobjectionable in form, reasonable and true, must be apparent. But he contends the appellee does not own the plant. I think the appellant would like to swindle them out of it, if he could do so. At pp. 10, 11, we have the law laid down, all that did not appear in "Our Opening Brief," and it strikes me that he might have refrained from citing refusal of trade-mark cases, as against the appellee, where the real reasons were that the article had enjoyed the great privilege of a patent for a number of years, and it was then sought to be perpetrated under the guise of a trade-mark. Now, is not one, or the other of these gentlemen(?) who charge all manner of fraud upon "Mr. Clarke," just a trifle afraid the Court, over which they seem to have appointed themselves, one or both of them, with several others perhaps, a protectorate, might obtain an idea that they were engaged in a "flagrant attempt to impose upon" said Court? And are they not trying to hood-wink the Court, when they make

statements which are not sustained by any proofs whatever? Or when they make statements where the proofs to the contrary are overwhelming? What mean they, when they state, page 39, of their brief, (or Gardiner's,) that the formula "is already known to all drug dealers and liquor men"? They stated the same in their answer, (p. 23, of record) in substance, yet not an iota of evidence to prove this bald assertion did any of these defendants introduce. They tried very hard indeed to draw some information regarding this formula, from *our* witnesses, yet signally failed. Why did they not put some of these drug and liquor men on the stand? Now they have the gall to assert that it is proved. Page 14, there is another statement which in their *soi disant* position of the Court's protectorate, they should as well have left out since it bears no weight, and is supremely ridiculous. The idea that "We proved" a wineglass should or does contain, or hold four ounces, is absurd, and if any member of this Court is in doubt, why they can easily take a look at the pharmacopia, in any drug store, or ask any druggist. Then it must be remembered, that neither the appellant nor any of the other defendants in any of the eight cases, produced one single instance of any hurtful effects produced by taking the Hostetter Bitters. The young lawyer who was persuaded to take overdoses, so as to appear as "a terrible example," was only made sleepy. Being a tonic and stimulant it was imprudent to take so much at a time. The quantity

taken by this only witness they pretend to produce, was this poor tool, and he took enough to last him a week, as much as he should have taken during that time. If one obtains ten 3-grain quinine pills, will he take them all within an hour?

Is it right for these distinguished protectorates to cite and quote something said by one Doctor Herman in "Diseases of Women"? Is that authority? It is not mentioned in any of the cases I ever heard of. I should like to cross-examine that man, and would have a perfect right to, before his sayings can be introduced as either law, or fact, in this case. Are not these protectionists seeking to deceive the Court? They make so many assertions which are not supported by the proofs. They quote, or pretend to quote from something not in evidence at all, to-wit, an almanac for 1901, which does not appear in the record. They, (or rather he, for I do not think Mr. Countryman the author,) on page 36, deliberately charges the physicians in New York, with having been bribed. This is the most insulting of all, and if the Mr. Gardiner will meet me in New York, it will give me pleasure to introduce him to any, or to all these gentlemen. Does this man imagine he can sway this Court by the invectives aimed at those who are his peers in all, save egotism? On page 37, there appears a driveling whine, because appellee did not question its witnesses upon something else besides Hostetter's Bitters. Appellee formulated the questions, submitted them to appellant,

and cross-questions were written, and then they were answered by the several witnesses. This was done at the instigation of appellant's handsome solicitor. He would have it done no other way, and now he howls and laments that he did not ask his questions in a different manner, or appear and question them. He squirms (38) for something he did not reach. He imagines that because alcohol is required as a menstruum in compounding the bitters, then it is all alcohol. How ignorant the man is. They fume because appellee did not go to other places, upon the motto that "misery loves company," I suppose. Enough were prosecuted to stop the sales of the bogus bitters, for the present, at least, though there was sufficient evidence adduced to warrant many other suits. He complains we let the drug stores alone. As a general rule druggists sell only by packages; all proprietary medicines, including Hostetter's Bitters. Liquor stores sell (if wholesale) to those they deem, or who are by them taken to be retailers, by the gallon, furnish the second hand bottles, and thus is started the most dastardly trade imaginable. Naturally a person having heard, or read of Hostetter's Bitters, goes to the saloon, asks for it, and if given the bogus stuff, at once proceeds to damn it. He wants to sample the article before making purchase of a whole bottle, or a case, to take home. Appellant's bitters, although looking like the appellee's, are not the same, and have not the same medicinal virtues. The harm is that the

genuine are given the injurious reputation. The plea that the acts of appellant are of but small moment; that the sales of this impure stuff are small, seems strange indeed. Why did they not allow the bill to be taken *pro confesso*, and so save expense? No, they would fight it to the bitter end, and if they could knock out the Hostetters, then they could sell all the bitters they liked. (Personally, I may be permitted to state, that my experience has been that those with whom I have remonstrated, and tried to persuade them to quit selling the imitation, or bogus bitters, have treated me with a courtesy about equal to that shown by Mr. Gardiner; that is to say, extremely insulting, so that I prefer to deal with them through the courts.) On page 48, is a singular statement. This man intimates that I, or my colleague, refused a certain request for a stipulation. It is not said a request therefor was made. In fact nothing was said about the matter. All the cases had been finally settled and the cost paid, leaving the Samuel case to the last. Mr. Countryman sent a young man to me at the Occidental to say that unless I would agree to a stipend, (I forget the exact sum,) he would appeal. My reply was, all right then, he can appeal. Why can a man have the hardihood to write and print such a mean and contemptible statement, charging me with being discourteous. His own student will tell him what a mistake(?) he has made.

Appellant pays a heavy tax to the Government. Until recently, a war tax. All the cologne spirits

used, the Peruvian bark, and a lot of other imported articles, pay a duty, so that the bitters are taxed to as full extent as may be. Appellant would have the Court believe, (p. 41) that Appellee escaped from this duty. Another *mistake* they have made. The bitters are sold far more to the Druggists than to others, and I obtained injunctions against two of the largest wholesale drug houses in the Northwest, at Milwaukee, before Judge Seeman, for selling Hostetter's Bitters by the gallon. They were like Samuels.

Page 31, "reading between the lines" of our witnesses there spoken of. (It sounds like Gardiner). All Appellee's testimony is worthless, to be sure, in the opinion of this loose-tongued Solicitor. Suppose we indulge in "reading between the lines." We see, first, a *contingent fee.* Then a share, or a block of stock in a corporation to make Hostetter's Bitters, if they (C. & G.) are successful. Then we see, or read, that the man who is quoted on page 48 is deeply interested in a financial way. Probably he has a large stock of the bogus bitters, still on hand, and is mighty anxious to get rid of the stuff. Afraid to ship up to the mines, because the Appellee's agents are still around, hunting out the rascals. By what right had they to quote this man? Who was it? Martinoni, Levy, Ahrens, Marisch, or who? This is no part of the record. I can read further. This Mr. Gardiner, being angered at my compliments (?) came into Court, and sat there, dark and glum. He had filed in the Court below a most insulting brief, without

the least provocation, further than that just alluded to, and I had answered it. The answer was not as mild as he wanted. I had failed to bow down and accept his *ipse dixit*, and he sought revenge. "Sweet is revenge", etc. Mr. Countryman was quite reasonable and respectful, in his "Opener", and so it is, still reading between the lines, I can not for a moment think he is the author of the "Supplemental Brief". He does not brag, as does Gardiner, (p. 51). Nor does he get down in the dust, cringe and beg for a decision reversing the Court below. Gardiner's brief is not logical. He pretends, and tries to make the Court believe that Hostetter's Bitters are the most injurious, health and life destroying concoction imaginable, and yet he contends that Appellant should have the uninterrupted privilege of making and selling them, to the innocent, poor deluded people, for whom he is shedding so many tears. "Consistency is a jewel" he knows not of.

In this man's intense egotism, he deemed it strange Appellee did not take the depositions in San Francisco, instead of in New York. It would have been so nice for him, or the whole raft of them, to have had the witnesses brought there, and they could all have had such a prolonged time, cross-examining them.

The plaint that Appellee's counsel has been discourteous, comes with poor grace from a man who absolutely refused to even acknowledge service of a notice, but preferred to compel service to be proved

by affidavit. And from a man who absolutely refused Mr. Galbreth the smallest sample possible of what it was claimed was bitters, made by the Hostetter Co. I do not now, and I never did believe, it was Hostetter's bitters, since the alcohol therein was far in excess of that in the genuine bitters. His discourteous refusal was convincing, anyhow.

Respectfully submitted,

ALBERT H. CLARKE,

Solicitor and of Counsel for Appellee.